Supreme Court, U.S.
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No. ——

In the Supreme Court of the United States

LPP MORTGAGE, LTD.,

Petitioner,

v.

STUART C. BRINLEY;
FREDERICK L. RADCLIFFE, JR.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

In each of these consolidated appeals, Petitioner holds a judgment lien on real estate owned by the Respondent, a Chapter 7 bankruptcy debtor. In each case, debtor filed a motion in the bankruptcy court to avoid Petitioner's judgment lien. Construing 11 U.S.C. Section 522(f), the Sixth Circuit Court of Appeals concluded that Petitioner's liens partially impaired the Debtors' $6,000 exemptions in the real estate, and that Petitioner's judgment liens could be partially avoided, allowing junior liens potentially to advance into Petitioner's secured position on the real estate.

The questions presented for review are as follows:

1. Whether the Sixth Circuit erred in its interpretation and application of 11 U.S.C. Section 522(f);

2. Whether the Sixth Circuit's interpretation of 11 U.S.C. Section 522(f) reaches an absurd result;

3. Whether the Sixth Circuit's interpretation of 11 U.S.C. Section 522(f) conflicts with the rulings of this Court; and

4. Whether the Sixth Circuit's application of 11 U.S.C. Section 522(f) partially avoiding Petitioner's judgment lien violated the Fifth Amendment of the U.S. Constitution.

LIST OF PARTIES AND CORPORATE DISCLOSURE STATEMENT

In each of these consolidated petitions, LPP Mortgage, Ltd. (hereafter "LPP") is the petitioner.

In Sixth Circuit case numbers 03-5607 and 03-5653, Stuart C. Brinley (hereinafter "Brinley") is the respondent and only other party. The latter case number represents the number of Brinley's cross-appeal.

In Sixth Circuit case number 03-5606, Frederick C. Radcliffe, Jr. (hereinafter "Radcliffe") is the respondent and only other party.

There are no corporate parties.

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CITATIONS OF THE OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS AND ORDERS ENTERED IN THE CASE

The Western District of Kentucky bankruptcy court opinions in *Brinley* and *Radcliffe* are both dated May 24, 2002. The *Brinley* opinion is reported at 278 B.R. 130 and 48 Collier Bankr. Cases 2d 186. App. 31a-37a. The *Radcliffe* opinion is reported at 278 B.R. 426 and 28 Collier Bankr. Cases 2d 241. App. 38a-44a.

The Western District of Kentucky opinions in *Brinley* and *Radcliffe* are dated March 31, 2003, and are both unreported. The citation for the *Brinley* opinion is No. 302 CV 378-S, 2003 WL 1825521 (W.D. Ky. Mar. 31, 2003), and the citation in *Radcliffe* is No. 302 CV 376-S, 2003 WL 1825451 (W.D. Ky. Mar. 31, 2003). App. 20a-30a.

The Sixth Circuit opinion in *Brinley* is dated March 22, 2005, and is published at 403 F.3d 415, Bankr. L. Rep. 80, 356, and 2005 Fed. App. 0141P. App. 1a-15a. The Sixth Circuit opinion in *Radcliffe* is dated March 30, 2005, and is not reported. The citation for the Sixth Circuit opinion in *Radcliffe* is No. 03-5606, 2005 WL 712746 (6th Cir. Mar. 30, 2005). App. 16a-19a.

STATEMENT OF JURISDICTION

The Sixth Circuit Court of Appeals entered judgment in *Brinley* on March 22, 2005, and in *Radcliffe* on March 30, 2005. This Court has jurisdiction to hear these cases pursuant to 28 U.S.C. Section 1254(1) and pursuant to Sup. Ct. R. 13.1.

Notification to the Solicitor General of the United States has been made to Room 5614, Department of Justice, 950 Pennsylvania Ave., N.W., Washington DC 20530-0001 for the United States Trustee.

STATUTES INVOLVED IN THE CASE

This case involves an interpretation of Section 522(f) of the Bankruptcy Code (11 U.S.C. Section 522(f)), which states, in pertinent part, as follows:

> (f)(1) Notwithstanding any waiver of exemptions ..., the debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled under subsection (b) of this section, if such lien is ---
>
> (A) a judicial lien, ...
>
> (2) (A) For the purposes of this subsection, a lien shall be considered to impair an exemption to the extent that the sum of –
> (i) the lien;
> (ii) all other liens on the property; and
> (iii) the amount of the exemption that the debtor could claim if there were no liens on the property;
> exceeds the value that the debtor's interest in the property would have in the absence of any liens.

11 U.S.C. Section 522(f).

The case also involves an interpretation of the Fifth Amendment of the United States Constitution, which states in pertinent part as follows: "nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V.

STATEMENT OF THE CASE

Brinley and Radcliffe filed separate Chapter 7 bankruptcy petitions on February 15, 2001, in the United States Bankruptcy Court for the Western District of Kentucky. The basis for the jurisdiction of the bankruptcy court is set forth in 28 U.S.C. Sections 157(a) and (b) and 1334(a) and (b), which confer upon the district and bankruptcy courts jurisdiction to hear cases under and related to Title 11 of the United States Code, the Bankruptcy Code. LPP holds a judgment lien on two properties, one owned by Brinley in a tenancy by the entirety and one owned by Radcliffe, related to the same underlying debt.

On April 9, 2001, Brinley and Radcliffe each filed a Motion to Avoid the Judgment Lien of PNC Bank, Kentucky, Inc., pursuant to Section 522(f) of the Bankruptcy Code. LPP is the successor by assignment of the judgment liens. LPP filed timely objections to the debtors' motions.

The parties stipulated to the facts of the respective cases while the motions to avoid lien were pending in the bankruptcy court. *See*, App. 45a-51a. The material facts in the two cases are essentially identical. In both cases, there is an undisputed first mortgage on the property. Following the first mortgage in priority is LPP's judgment lien. Junior to LPP's judgment lien, there is a consensual mortgage on Brinley's property and a state tax lien on Radcliffe's. In each of the cases, LPP's lien attaches in part to non-exempt equity.

A chart of the lien priorities is as follows, including figures that have been rounded for convenience:

Brinley	
Property Value	$280,000
1st Mortgage for	$180,000
LPP's judgment lien	$112,418
Junior Mortgage for	$ 80,350
Brinley's Exemption	$ 6,000
Radcliffe	
Property Value	$250,000
Property taxes for	$ 15,000
1st Mortgage for	$180,000
LPP's judgment lien	$112,418
State tax lien for	$ 56,500
Radcliffe's Exemption	$ 6,000[1]

See, App. 45a-51a.

Brinley and Radcliffe both argued that the total liens on their respective properties, plus their respective exemptions, exceeded their interests in their properties. They argued that LPP's judgment liens could be avoided under the Section 522(f)(2) calculation. LPP argued that Section 522(f) must be read to preserve the state law priority scheme of "first in time, first in right," and that the liens junior to LPP's

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[1] There are several junior judgment liens on the property in the Radcliffe case, enumerated in the Agreed Stipulations in the Appendix. However, the junior judgment liens are not pertinent to the arguments here.

judgment liens should not be counted in the calculation. LPP noted that its reading of the statute was consistent with the language in the Bankruptcy Code, allowed for preservation of the debtors' exemptions, and matched the intent of Congress.

The bankruptcy court entered orders on May 24, 2002. In accordance with the language and intent of the Bankruptcy Code, well-established state priority law, as well as the United States Constitution, the bankruptcy court held that, to the extent LPP's judgment liens attach to non-exempt equity, they are not avoidable. The bankruptcy court noted:

> We do not believe, however, that Congress intended to alter state law lien priorities when it added the above section. The position espoused by the Debtor ignores the U.S. Constitution, specifically, the Fifth Amendment takings clause by eliminating existing property rights....
>
> We therefore join the courts that construe the language of the statute to prevent the unjust result produced by merely totaling all liens and the exemption, without regard to state law priorities. This position is supported by the Congressional Record in support of the 1994 Amendments to section 522(f), where the dissent in *In re Simonson*, 758 F.2d 103, 106-113 (3rd Cir. 1985) is adopted.

In re Brinley, 278 B.R. 130, 132 (Bankr. W.D. Ky. 2001), *rev'd in part*, 403 F.3d 415 (6th Cir. 2005), *petition for cert. filed herein*; *In re Radcliffe*, 278 B.R. 426, 427-28 (Bankr. W.D. Ky. 2002), *rev'd*, No. 03-5606, 2005 WL 712746 (6th Cir. Mar. 30, 2005), *petition for cert. filed herein.*

Brinley and Radcliffe filed timely appeals to the District Court for the Western District of Kentucky on May 31, 2002.

The district court had jurisdiction to hear the appeals pursuant to 28 U.S.C. Section 158(a). The district court issued Orders and Memoranda on March 31, 2003, reversing the pertinent portions of the decisions of the bankruptcy court and completely eliminating LPP's liens on both properties. *Brinley v. LPP Mortgage, Ltd.*, No. 302 CV 378-S, 2003 WL 1825521, at p. 2 (W.D. Ky. Mar 31, 2003), *rev'd in part*, and *Radcliffe v. LPP Mortgage, Ltd.*, No. 302 CV 376-S, 2003 WL 1825451, at p. 2 (W.D. Ky. Mar. 31, 2003), *aff'd*. The district court reasoned that, "State lien priority law, while perhaps useful in state foreclosure proceedings, simply has no applicability when Congress has spoken on the subject, and clearly." *Brinley*, 2003 WL 1825521, at p. 2; *Radcliffe*, 2003 WL 1825451, at p. 2. Although the issue of the constitutionality of Section 522(f) was presented to the district court, no ruling on this issue was made.

On April 28, 2003, LPP filed a timely notice of appeal to the United States Court of Appeals for the Sixth Circuit.[2] The Sixth Circuit had jurisdiction to hear the appeal pursuant to 28 U.S.C. Sections 158(d) and 1291.

On March 22, 2005, the Sixth Circuit issued an opinion in the *Brinley* case reversing in part and affirming in part the decision of the district court. Although Brinley claims only a $6,000 exemption, and although LPP's lien attaches to non-exempt equity, the Sixth Circuit held that LPP's lien is avoided in the amount of $98,763.44, and that LPP retains a lien in the amount of $13,654.91. This result is derived as follows: calculate the total of the liens and the exemption

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[2] Brinley filed a cross-appeal in the Sixth Circuit with regard to the finding that his tenancy by the entireties interest in his property is equal to the entire value of the property.

($378,763.44), less the value of the property ($280,000), which leaves $98,763.44 of unsecured liens impairing the exemption; LPP's judgment lien of $112,418.35 was thus avoided to the extent of $98,763.44, and preserved to the extent of $13,654.91. In so holding, the Sixth Circuit stated as follows:

> The more difficult issue in this appeal requires us to choose between faithfulness to the explicit language of a controlling statute, with the resulting upset of the state law of lien priorities, and adherence to established lien priorities in the face of an evident Congressional intent to modify such treatment of creditors.

Brinley v. LPP Mortgage, Ltd. (In re Brinley), 403 F.3d 415, 422 (6th Cir. 2005).

The Sixth Circuit also found that there was no impermissible taking under the Fifth Amendment of the U.S. Constitution. *Brinley*, 403 F.3d at 422. The Sixth Circuit did not make clear whether the lienholder junior to LPP advances in priority and now is secured by equity in the real estate formerly securing LPP's lien, or whether the junior lienholder retains his position on the property and the equity formerly subject to the avoided lien goes to the estate, or perhaps the debtor himself inasmuch as the bankruptcy trustee has abandoned the property. The *Radcliffe* decision followed the decision in *Brinley*. *LPP Mortgage, Ltd. v. Radcliffe*, No. 03-5606, 2005 WL 712746 (6th Cir. Mar. 30, 2005). This timely, consolidated petition followed.

In addition to the Sixth Circuit decisions in *Brinley* and *Radcliffe*, two other Circuit Courts and the Ninth Circuit Bankruptcy Appellate Panel have addressed the language of Section 522(f) of the Bankruptcy Code when presented with similar facts. The Eighth Circuit addressed the issue in *In re Kolich,* 328 F.3d 406 (8th Cir. 2003), and the Eleventh Circuit recently decided *The Cadle Co. v. Taras (In re Taras),* No. 04-13727, 2005 WL 1006870 (11th Cir. Apr. 29, 2005). The Ninth Circuit Bankruptcy Appellate Panel issued a decision in *Moldo v. Charnock (In re Charnock)*, 318 B.R. 720 (B.A.P. 9th Cir. 2004). The Sixth Circuit, Eleventh Circuit, and Ninth Circuit BAP followed the decision of the Eighth Circuit in *Kolich*.

The 2005 amendments to the Bankruptcy Code do not affect Section 522(f) or resolve the problems at issue herein.

ARGUMENT FOR ALLOWANCE OF THE WRIT

A writ of certiorari should be issued for the following three reasons: (1) the Sixth Circuit's interpretation and application of Section 522(f) of the Bankruptcy Code overrides fundamental state property rights far exceeding any federal interest, reaches an absurd result, and ignores the relevant decisions of this Court pertaining to statutory construction; (2) the Sixth Circuit, albeit reluctantly, has adopted an interpretation of the Bankruptcy Code that encourages debtor abuse in an era when Congress has expended enormous resources to curb debtor abuse; and (3) the Sixth Circuit's interpretation of Section 522(f) violates the Takings Clause of the Fifth Amendment to the U.S. Constitution.

I. The Sixth Circuit's interpretation and application of Section 522(f) of the Bankruptcy Code overrides fundamental state property rights far exceeding any federal interest, reaches an absurd result, and ignores the relevant decisions of this Court pertaining to statutory construction.

This case presents an important federal question because the Sixth Circuit's application of Section 522(f) shakes the foundation of state property law without adequate justification in the federal statute, reaches an absurd result, and ignores the teachings of this Court. This Court teaches that there is unquestionably a presumption in favor of preserving state property rights when interpreting the Bankruptcy Code. *See*, *Butner v. U.S.*, 440 U.S. 48 (1979), and *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 543 (1994). In *Butner*, the Court wrote as follows:

> Property interests are created and defined by state law. Unless some federal interest requires a different result, there is no reason why such interests should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding. Uniform treatment of property interests by both state and federal courts within a State serves to reduce uncertainty, to discourage forum shopping, and to prevent a party from receiving "a windfall merely by reason of the happenstance of bankruptcy." The justifications for application of state law are not limited to ownership interests; they apply with equal force to security interests....

Butner, 440 U.S. at 55, *quoting Lewis v. Manufacturers Nat. Bank*, 364 U.S. 603, 609 (1961). Further, the *Butner* Court stated, " ... the federal bankruptcy court should take whatever

steps are necessary to ensure that the mortgagee is afforded in federal bankruptcy court the same protection he would have under state law if no bankruptcy had ensued." *Id.* at 56.

The Sixth Circuit's decision dramatically changes the protections state law provides to Petitioner by avoiding Petitioner's fully secured property right far beyond debtor's exemption. Moreover, the Sixth Circuit has not made clear whether its decision to avoid $94,000 of LPP's formerly non-exempt secured position on debtor's real estate elevates the junior mortgagee's unsecured interest to fully secured status, a result far beyond any federal interest represented by the Bankruptcy Code, or whether the avoidance maintains the relative lien priority positions and preserves the $94,000 for the estate. In the latter event, the trustee's abandonment of the property and closing of the bankruptcy case would result in an enormous windfall to the debtor, again far exceeding any federal interest in protecting the debtor's $6,000 exemption. Either way, the Sixth Circuit's decision overrides state property rights and reaches an absurd result.

This Court's aversion to upsetting state property laws, even where the Bankruptcy Code appears to demand otherwise, is evident in the landmark case of *BFP v. Resolution Trust Corp.*, 511 U.S. 531 (1994). In *BFP*, this Court interpreted 11 U.S.C. Section 548, the fraudulent transfer provision of the Bankruptcy Code. That statute was quite clear on its face: "The trustee may avoid any transfer of an interest of the debtor in property, . . . if the debtor voluntarily or involuntarily . . . received less than a reasonably equivalent value . . . ." The issue was whether the debtor received less than a reasonably equivalent value in exchange for the involuntary transfer of real estate pursuant to a pre-petition foreclosure sale, where the property, which

the debtor claimed was worth over $725,000, was sold for $433,000. *BFP*, 511 U.S. at 533-34.

The Court found that the Bankruptcy Code should not be construed to upset long-standing principles of state foreclosure law. *BFP*, 511 U.S. at 544-45. The Court considered the history and harmonious co-existence of foreclosure law and fraudulent transfer law and also noted that the law favors maintaining common law rights. "[S]tatutes that invade common law must be read with presumption favoring retention of long-established principles absent evident statutory purpose to the contrary." *BFP*, 511 U.S. at 543, *explaining U.S. v. Texas*, 507 U.S. 529, 534 (1993); *see also*, *United Sav. Assn. Of Tex. v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365, 680 (1988); *Midlantic Nat. Bank v. New Jersey Dept. of Environmental Protection*, 474 U.S. 494, 501 (1986). Therefore, despite the plain language of the Code, the Court found that a foreclosure sale conducted in accordance with state law produces the "reasonably equivalent value" for the real estate. *BFP*, 511 U.S. at 543.

The Court noted as follows:

> Federal statutes impinging upon important state interests "cannot ... be construed without regard to the implications of our dual system of government... [W]hen the Federal Government takes over ... local radiations in the vast network of our national economic enterprise and thereby radically readjusts the balance of state and national authority, those charged with the duty of legislating [must be] reasonably explicit." It is beyond question that an essential state interest is at issue here: We have said that "the general welfare of society is involved in the security of the titles to real estate" and the power to

> ensure that security "inheres in the very nature of [state] government."

BFP, 511 U.S. at 544 (citations omitted).

In reviewing the interplay between state real property law and bankruptcy law, the Court wrote, "To displace traditional state regulation in such a manner, the federal statutory purpose must be 'clear and manifest'. Otherwise, the Bankruptcy Code will be construed to adopt, rather than to displace, pre-existing state law." *BFP*, 511 U.S. at 544-45 (citations omitted).

The intent to depart from state priority law and to strip property rights from a creditor fully secured by non-exempt equity is not "clear and manifest" in Section 522(f), and there was no intent by Congress to permit this result. *See*, 140 Cong. Rec. H10752-01, H10769 (1994); *and see*, *In re Brinley*, 278 B.R. at 132. The concept of "first in time, first in right" is a basic precept of state property law. The Sixth Circuit reluctantly cast aside this tenet of state law without examination of its importance in real estate transactions and without examination of whether there is a more correct interpretation and application of Section 522(f) that leads not to an absurd result, but to the result Congress intended. In so doing, the Sixth Circuit ignored the teachings of *BFP* to the effect that even a statute clear on its face must be interpreted to avoid an absurd result and to protect state property rights.

The decisions below demonstrate that Section 522(f) can be applied to reach an absurd result and to impermissibly override state property law. Under these circumstances, this Court will consult the legislative history of the statute to determine Congressional intent. *U.S. v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 242 (1989). Congress's 1994 amendment

to Section 522(f) was a reaction to cases eliminating or curtailing the language of Section 522(f). With the amendment, Congress intended to effect the following changes: (1) allow unsecured portions of judgment liens to be stripped off, and (2) in situations where a judgment lien attached to equity in the property, to require payment of a debtor's exemption in the place of the judgment lien to the extent of the exemption. H.R. Rep. 103-835, at 52-54 (1994).

In its enactment of the amendment to Section 522(f), Congress expressly adopted the position of the dissent in *Simonson v. First Bank of Greater Pittston (In re Simonson)*, 758 F.2d 103 (3rd Cir. 1985), *overruled by statute in 1994*. 140 Cong. Rec. H10752-01, H10769. In *Simonson*, the real estate was encumbered, in order of priority, by a consensual first mortgage, two judgment liens, and then by a junior mortgage. The total value of the debtors' exemptions ($15,000) exceeded the value of the two judgment liens ($14,411.33). *See*, *Simonson*, 758 F.2d at 104. The majority held that because the two mortgages had a value exceeding the property's value, there was no exemption available to the debtors for the judgment liens to impair. Therefore, the debtors' motion to avoid the judgment liens was denied. *Id.*, 758 F.2d at 106.

Dissenting Judge Edward R. Becker carefully examined the Congressional intent and determined that in any sale, the debtors' exemptions should be paid before payment to a judgment lien creditor. *Simonson*, 758 F.2d at 110-11 (dissenting opinion). Because the value of the exemptions in that case exceeded the value of the judgment liens, the dissenting judge found that the liens should be avoided in full. As part of his dissent, however, Judge Becker opined that state priority law should be preserved:

> Under my view of this case, therefore, the Simonsons should be permitted to apply to their exemption the value of the avoided liens, $14,411.33, leaving the SBA in the same priority position it occupied prior to the commencement of the case. This result not only effectuates Congress' intent to preserve the debtor's 'fresh start,' but also *prevents a junior encumbrancer from receiving a windfall merely because the debtor chose to avoid the superior judicial liens*. *See* H.R.Rep. No 595, 95th Cong., 1st Sess. 376, reprinted in 1978 U.S.Code Cong. & Ad.News 5963, 6332 (noting that a primary purpose of §522 as a whole is to prevent junior creditors from benefiting at the expense of the estate when senior liens are avoided).

Id., 758 F.2d at 112 (emphasis added). The dissent in *Simonson* balances the debtor's fresh start, by preserving the exemption, with the fair treatment of lienholders in preserving their state law property rights. *Id.* In Judge Becker's view, "under the structure of the bankruptcy code, the relative priority positions of the four encumbrances are critical." *Id.*, 758 F.2d at 107. Congress expressly adopted Judge Becker's dissent in the legislative history to the 1994 amendments to Section 522(f). 140 Cong. Rec. H10752-01, H10769.

Thus, Judge Becker recognized the two problems that would occur if Section 522(f) allowed avoidance of a judgment lien beyond the amount of the exemption and the unsecured portion of the lien. First, a junior lienholder could advance to the detriment of the bankruptcy estate and receive a windfall; and second, granting a debtor more equity than the amount of his exemption would provide not just a fresh start, but a head start. *See*, *also*, *Dewsnup v. Timm*, 502 U.S. 410, 417 (1992). Under Congress's view of *Simonson*, Section

522(f) should be read to "carve out" the exemption from the judgment lien without altering the state law priorities. Failure to follow this application would result either in a windfall to the junior lienholder, a "head start" to the debtor, or both.

Following this principle in the instant cases, the exemptions of $6,000 must be preserved, and any unsecured portion of the lien should be stripped off. Once that is done, however, there is no further federal interest in avoiding the lien. While the bankruptcy judge understood this, the district court and the Sixth Circuit did much more than this when they avoided the portions of LPP's liens that attach to non-exempt equity beyond the amount of the debtors' exemptions. The Sixth Circuit has not only upset long-standing principles of state law here, but also, it has granted Radcliffe and Brinley head starts, not the fresh starts intended by Congress.

Moreover, the Sixth Circuit did not follow the teachings of *Butner*, *BFP*, or *Dewsnup* in its analysis of Section 522(f) of the Bankruptcy Code. Before departing from a precept of state law, the Sixth Circuit was required to determine if the statute was clear, whether its result was absurd, and whether Congressional intent to depart from the state property law was clear and manifest. *Butner*, 440 U.S. at 55; *BFP*, 511 U.S. at 544-45; *Lamie v. United States Trustee*, 540 U.S. 526, 534 (2004). In failing in its charge, the Sixth Circuit has taken away a properly perfected, non-exempt property interest without just compensation, encouraged forum shopping, and allowed a "windfall [to the junior lienholder and the debtor] merely by reason of the happenstance of bankruptcy." *Butner*, 440 U.S. at 55, *quoting Lewis v. Manufacturers Nat. Bank*, 364 U.S. at 609. The Sixth Circuit's holding here has promoted the exact dangers that the unanimous Court in *Butner*, as well as the majority in *BFP*, warned against.

There can be no question that preserving state law lien priorities and state-created property rights is essential to the balance of state and national authorities. Clearly, this case presents an important issue of federal bankruptcy law that has not been, but should be, settled by this Court. This Court should not permit the Circuit Courts to decide an important federal question in a way that reaches an absurd result, that conflicts with the relevant decisions of this Court, and that turns long-standing principles of state law upside down.

II. The Sixth Circuit's application of Section 522(f) promotes debtor abuse in an era when Congress has expended enormous resources to curb debtor abuse.

The Sixth Circuit, in *Brinley*, struggled with the fact that its conclusion allows debtors to engage in bankruptcy planning that will lead to bankruptcy abuse. *Brinley*, 403 F.3d at 422. Judge Dowd, in his concurring opinion, stated, "However, the notion that a subsequent mortgage lien, under the bankruptcy law, preempts an earlier filed judgment lien turns the whole concept of creditors' rights on its head. The potential for fraud is obvious." *Id.*, at 423 (concurring opinion).

Judge Dowd was not alone in fearing the abuse that may result from such a construction of Section 522(f). Chief Judge Arthur B. Federman of the United States Bankruptcy Court for the Western District of Missouri held:

> That application of the formula, however, offers potential for abuse. A debtor, for instance, could nullify the priority of a properly obtained judicial lien by borrowing $80,000 from a bank, granting the bank a second mortgage on his home, and then using the loan proceeds on a gambling spree. Or, perhaps, a

> debtor, burdened by a judicial lien, could grant a family member a second mortgage on his home prior to filing a bankruptcy petition, thus wiping out a prior judicial lien. Surely Congress never intended to adopt a formula that permits this kind of abuse.

In re Kolich, 264 Bankr. 544, 549-550 (Bankr. W.D Mo. 2001), *rev'd*, 328 F.3d 406 (8th Cir. 2003).

The facts of *In re Kolich, supra*, are a perfect example of abuse. In *Kolich*, the real estate was encumbered, in order of priority, by a first mortgage, a judgment lien, and then a junior mortgage in third priority. The money from the junior mortgage was used to fund a Las Vegas gambling spree. *Kolich*, 264 B.R. at 546-47. Unsuccessful in Las Vegas, the homeowner filed bankruptcy and moved to avoid the intervening judgment lien. *Id.* Constrained by a "literal interpretation" of Section 522(f), the Eighth Circuit avoided the intervening judgment lien. *Kolich*, 328 F.3d at 410. The Eighth Circuit wrote as follows:

> We are not entirely comfortable with the equities of literally applying the statutory formula in this situation. It may give a debtor contemplating bankruptcy the ability to wipe out judicial liens by persuading a lender to take an otherwise junior consensual lien that renders the exempt property over-encumbered and therefore ripe for impairment. One would expect lenders to refuse to make such high- risk loans, but there may be times when self-interest or hard-to-detect collusion will lead to an abuse of Section 522(f).

Id.

The enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (hereinafter "BAPCPA") emphasizes that bankruptcy abuse is an important federal question.[3] House Report 109-31, dated April 8, 2005, indicated several factors supporting bankruptcy reform. The Committee included the following: "A third factor motivating comprehensive reform is that the present bankruptcy system has loopholes and incentives that allow – and sometimes – even encourage opportunistic personal filings and abuse." H.R. Rep. 109-31, at 2 (2005). "Such abuse ultimately hurts consumers as well as creditors." *Id.*

Congress has also enacted Bankruptcy Code sections relating to curbing abuse. *See*, 11 U.S.C. Sections 109(g) and 707(b). The Supreme Court discourages findings that promote bankruptcy abuse. *See*, *Perry v. Commerce Loan Co.*, 383 U.S. 392, 403 (1966).

The Sixth Circuit's interpretation of Section 522(f) is exactly the type of loophole that Congress has worked hard to eliminate. The Sixth and Eighth Circuits' application of Section 522(f) will allow debtors with judgment liens on their properties to obtain consensual mortgages, use the proceeds to gamble, purchase luxury goods, or spend as "free money" to forestall filing bankruptcy. The debtors may then file bankruptcy, avoid senior judgment liens of the creditor that the debtor does not wish to pay, and repay only the consensual liens, all under the guise of protecting a homestead exemption. The Sixth Circuit's application of Section 522(f), which encourages debtor abuse of the bankruptcy system despite a

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[3] The applicable language of Section 522(f) is not changing under the new law, perhaps because the full impact of the 1994 amendments to the Bankruptcy Code are just now being discovered.

clear Congressional mandate to the contrary, raises a question of national importance.

III. The Sixth Circuit's interpretation of Section 522(f) violates the Takings Clause of the Fifth Amendment to the U.S. Constitution.

This case presents an important federal question also because the Sixth Circuit's application of Section 522(f) results in a taking under the United States Constitution that entitles judgment lienholders to just compensation. The Takings Clause of the Fifth Amendment to the United States Constitution provides as follows: "nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V. The Supreme Court has stated that "The Fifth amendment guarantee . . . [is] designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Penn Central Transportation Company v. City of New York*, 438 U.S. 104, 123 (1978).

Under Kentucky law, a judgment lien is a property right that falls within the purview of the protection of the Fifth Amendment takings clause. *In re Cunningham*, 17 B.R. 463, 465, 467 (Bankr. W.D. Ky. 1981). Unlike contractual rights, property rights, or creditors' interests in collateral, are protected by the Fifth Amendment. *U.S. v. Security Industrial Bank*, 459 U.S. 70, 75 (1982). While nearly all debts may be discharged, thereby relieving debtors of their contractual duties, properly perfected property interests that attach to non-exempt equity in collateral may not be avoided. *See, e.g.*, 11 U.S.C. Section 506.

A debtor's fresh start, in the form of his or her exemption, is the public benefit that Congress sought to

protect in Section 522(f). *See*, Section 522(f)(1); H.R. Rep. 103-835, at 53. Section 522(f)(1) states in part: "the debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs an exemption . . ." 11 U.S.C. Section 522(f)(1). The statute does not state that the debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent such a lien impairs an exemption and attaches to additional, non-exempt equity. The language of the statute clearly shows that the goal of the statute is to protect the exemption without providing the debtor with unlimited equity in the property. *Id.*

In *Radcliffe* and *Brinley*, LPP agrees that each of the debtors is entitled to receive $6,000 from the distribution in any sale of the real estate before payment to LPP. LPP also concedes that each of its liens may be avoided to the extent that the lien is unsecured. Yet the Sixth Circuit has read Section 522(f) so that the Bankruptcy Code takes much more than the governmental interest, more than the exemption, and more than is permitted for public use. This gap between the governmental interest of protecting a $6,000 exemption and the taking of $94,000 in non-exempt equity in *Brinley*, and $64,000 in *Radcliffe*, constitutes an impermissible taking under the Fifth Amendment.

The Sixth Circuit's application of Section 522(f) in *Brinley*, which omitted an analysis of the results of the lien avoidance, evidences the violation of the Fifth Amendment. When Brinley filed bankruptcy, the mortgage in third priority position was completely unsecured. Brinley was entitled to an exemption of $6,000. LPP's $112,418 lien attached to $100,000 in equity ($280,000 property value less $180,000 first mortgage) and was unsecured in the amount of $12,418. It is undisputed that under Section 522(f), Brinley is entitled

to strip off the unsecured portion of LPP's lien and also avoid the lien to the extent of his $6,000 exemption. Nevertheless, the Sixth Circuit concluded that over $98,000 of LPP's lien should be avoided.

The Sixth Circuit's opinions create further confusion because they do not state whether the junior mortgage would advance in priority and take LPP's equity, or whether the debtor would receive the equity unencumbered as a windfall. If the junior mortgagee advances in priority, it receives a windfall. The junior mortgagee, who was completely unsecured pre-petition, would now advance to be fully secured – a result that is neither contemplated nor condoned in the plain language of the statute or in the legislative history. Likewise, the Sixth Circuit's application of the statute impermissibly expands the avoidance power in Section 522(f) beyond the exemption amount. The debtor received the benefit of his exemption after the first $6,000 in equity was granted to him. There is a taking under the Fifth Amendment because there is no governmental interest in taking the creditor's property right after a debtor's exemption has been paid.

The other reading of the Sixth Circuit's avoidance of LPP's lien is that the junior mortgage does not advance in priority, but LPP's lien is avoided. In that instance, the debtor receives the benefit of $100,000 in equity. Granting the debtor $100,000 in unencumbered equity when his exemption is only $6,000 also constitutes an impermissible taking under the Fifth Amendment because the government has taken so much more than was designated by Congress for the public use.

The *Radcliffe* case further illustrates that avoiding a judgment creditor's lien that attaches to non-exempt equity

constitutes a taking under the Fifth Amendment. In *Radcliffe*, even after avoidance of the portion of LPP's judgment lien that attached to non-exempt equity in the property, there was no equity remaining for the debtor's homestead exemption. The property is now in foreclosure, and LPP no longer has a lien on the real estate. LPP was deprived of a valid property right without any compensation or the furtherance of protecting the $6,000 exemption in the real estate.

Congress intended to protect a $6,000 exemption in each of these bankruptcy cases. Yet the Sixth Circuit has issued opinions that allow windfalls to the debtors and junior lienholders. The result is at odds with the United States Constitution and is simply absurd. The bankruptcy judge, in the *Kolich* case, noted:

> Since there is no other Code section that allows a Court to ignore the relative priority pre-petition position of liens, I find it would be an absurd result to construe section 522(f)(2)(A) to allow a debtor to erase an otherwise unavoidable judicial lien by taking out a junior mortgage.

Kolich, 264 B.R. at 550.

The decisions below violate the Takings Clause because they take away property rights that far exceed the exemption amount. The decisions deprive LPP of its interests in properties without *any* compensation. There is no governmental interest in taking $94,000 and $64,000 of non-exempt equity so that the debtors may each have a $6,000 exemption.

CONCLUSION

For these reasons, LPP urges the Court to grant this petition for a writ of certiorari. While deciding an important question of federal law that has not been, but should be, settled by this Court, the decisions below have upset the balance between state and federal authorities. Moreover, the Sixth Circuit has decided this important federal question in a way that clearly conflicts with the relevant decisions of this Court. If left intact, these decisions will denigrate important and well-established state property rights far exceeding any federal interest, impose an absurd result, and ignore the clear teachings of this Court. The decisions further encourage debtor abuse and violate the Takings Clause of the Fifth Amendment.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 03-5607 / 03-5653

[Filed March 22, 2005]

In re: STUART C. BRINLEY, Debtor.	)
STUART C. BRINLEY, Appellee/Cross-Appellant,	)
v.	)
LPP MORTGAGE, LTD., Appellant/Cross-Appellee.	)

Appeal from the United States District Court
for the Western District of Kentucky
at Louisville
No. 02-00378
Charles R. Simpson III, District Judge

Before: BATCHELDER and DAUGHTREY, Circuit Judges; DOWD, District Judge.*

OPINION

MARTHA CRAIG DAUGHTREY, Circuit Judge. In this appeal, we are asked to determine the extent to which a judgment lien impairs a debtor's statutory exemption. Both the debtor, Stuart C. Brinley, and the creditor, LPP Mortgage, Ltd., dispute portions of the district court's ruling that reversed the bankruptcy court's ruling on the debtor's motion to avoid the judgment lien of the creditor. Specifically, LPP contends that the district court erred in concluding that Brinley's statutorily-based exemption from bankruptcy estate property was impaired by LPP's entire judgment lien on Brinley's real estate.

Brinley, in turn, insists that the bankruptcy and district courts did not properly calculate the value of his interest in the real property in question in this litigation. Although we conclude that the district court and the bankruptcy court correctly valued the debtor's interest in property he held as a tenant by the entirety, we further conclude that the district court incorrectly determined the extent to which LPP's lien impaired Brinley's statutory exemption. We therefore affirm the district court judgment in part, reverse in part, and remand the case for further proceedings.

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* The Honorable David D. Dowd, United States District Judge for the Northern District of Ohio, sitting by designation.

FACTUAL AND PROCEDURAL BACKGROUND

The parties to this appeal have stipulated to all relevant facts underlying the litigation. Pursuant to the stipulation, they agree that Stuart Brinley and his non-debtor spouse own $280,000 worth of property jointly with rights of survivorship (that is, as tenants by the entirety). The property is secured by a first mortgage held by PHH US Mortgage Corporation in the amount of $180,000. The parties further agree that approximately three months after the Brinleys executed that initial mortgage, a judgment lien ultimately assigned to LPP in the amount of $112,418.35, plus interest, was also placed against the property. Years later, the debtor and his wife executed a second mortgage on the same property with Bank One, Kentucky, N.A. The amount presently due and owing on that junior lien is $80,345.09.

Unfortunately, Stuart Brinley was ultimately forced to seek protection under Chapter 7 of the United States Bankruptcy Code. Then, without complaint from LPP, Brinley claimed entitlement to a statutory exemption in the amount of $6,000. Because the mortgages and judgment lien on Brinley's primary asset far exceeded the value of that land, however, the debtor's right to his claimed exemption was seriously impaired.

To preserve the $6,000 exemption, the bankruptcy court and the district court took different analytical paths when this case was before them. The bankruptcy court examined relevant statutory provisions and concluded that the most junior lien on the Brinleys' property, the second residential mortgage in the amount of $80,345.09, should first be avoided in its entirety before LPP's judgment lien was partially avoided to reduce Brinley's indebtedness sufficiently to give effect to the exemption. On appeal from that

determination, the district court, interpreting the same statutory provisions, ruled that LPP's judgment lien, even though senior in priority to Bank One's second mortgage on the real property, should first be avoided in its entirety in order to allow the debtor to take advantage of the claimed exemption.

LPP now appeals from that district court judgment. Although the creditor does not contest the debtor's right to avoid some of the judgment lien attached to the Brinleys' property, LPP advocates adoption of the *bankruptcy court's* analysis that would minimize the amount of the judgment lien that would be avoided.

Despite reaping the benefit of avoiding the LPP judgment lien in full, Brinley also appeals from the district court ruling, claiming that the court erred in considering the entire $280,000 value of his property when calculating the amount of the lien avoidance. He contends that, because he owned the property as a tenant by the entirety with his non-debtor wife, the court should have valued his share of the subject property at only $140,000.

DISCUSSION

We review a district court's conclusions of law in a bankruptcy appeal de novo. *See Holland v. Star Bank, N.A. (In re Holland)*, 151 F.3d 547, 548 (6th Cir. 1998). The bankruptcy court's initial factual findings, however, are reviewed by both the district court and by this court only for clear error. *See id.*

I. Statutory Framework for Avoidance of Judicial Liens

One of the purposes of federal bankruptcy law is to accord to the debtor a "fresh start" from past financial difficulties. *See id.* at 550 (citing *In re Miller*, 198 B.R. 500, 505 (Bankr. N.D. Ohio 1996)). To that end, 11 U.S.C. § 522(f)(1), in relevant part, provides:

> [T]he debtor may avoid the fixing of a lien on an interest of the debtor in property *to the extent that such lien impairs an exemption to which the debtor would have been entitled . . . if such lien is* –
>
> *(A) a judicial lien*. . . or
>
> (B) a nonpossessory, nonpurchase-money security interest in any
>
> > (i) household furnishings, household goods, wearing apparel, appliances, books, animals, crops, musical instruments, or jewelry that are held primarily for the personal, family, or household use of the debtor or a dependent of the debtor;
> >
> > (ii) implements, professional books, or tools, of the trade of the debtor or the trade of a dependent of the debtor; or
> >
> > (iii) professionally prescribed health aids for the debtor or a dependent of the debtor.

(Emphasis added.)

To aid in the determination of "the extent that such lien impairs an exemption," Congress amended the Bankruptcy Code in 1994 to add subsection (2)(A) to § 522(f) of title 11. That "new" subsection states:

> For the purposes of this subsection, a lien shall be considered to impair an exemption to the extent that the sum of
>
> (i) the lien;
>
> (ii) all other liens on the property; and
>
> (iii) the amount of the exemption that the debtor could claim if there were no liens on the property;
>
> exceeds the value that the debtor's interest in the property would have in the absence of any liens.

No one disputes that these provisions of 11 U.S.C. § 522(f) accurately describe the calculations to be undertaken to determine what portion of a judicial lien may or must be avoided in order to give effect to a debtor's exemption. Although the courts and the parties concur in the actual decisional framework to be utilized, they would arrive at different results based upon the application of the framework to the facts of this case.

A. Bankruptcy Court Version

In applying the seemingly straight-forward provisions of 11 U.S.C. § 522(f) to this case, the bankruptcy court concluded that only $18,418.35 of LPP's judgment lien would be avoided by giving effect to the debtor's exemption, "leaving LPP with a judgment lien of $94,000 on the Property." To

obtain those figures, the bankruptcy court did not aggregate the values of LPP's judicial lien ($112,418.35), the first mortgage on the property ($180,000.00), the second mortgage on the property ($80,345.09), and the debtor's claimed exemption ($6,000.00), as required by the statute. Instead, in arriving at the figure by which the liens and the exemption exceeded the value of the property without liens ($280,000.00), the bankruptcy court ignored the second mortgage on the property that was junior to LPP's judgment lien. By doing so, the court immediately reduced the impairment of the exemption by the $80,345.09 value of the second mortgage and left a difference between (a) the sum of the remaining liens and exemption amount ($298,418.35) and (b) the value of the property without liens ($280,000.00) of $18,418.35, the amount by which LPP's judgment lien must be avoided. Subtracting that amount from the total $112,418.35 value of the judgment lien, the bankruptcy court concluded that the creditor was still left with a $94,000 judgment lien on the property.

In reaching the result it did, the bankruptcy court openly admitted that it failed to follow the explicit language of the bankruptcy statute. The court felt compelled to interpret the law as it did, however, because adherence to the strict provisions of the code would produce an "unjust result . . . without regard to state law priorities [of liens]." Not surprisingly, LPP endorses the bankruptcy court's analysis of the statute and its operation because initial application of the junior lien value to the amount by which the debtor's exemption is impaired reduces LPP's "loss" by an equal amount.

B. District Court Version

Unlike the bankruptcy court, the district court felt obligated to adhere to the formulaic calculations called for in the statute. By so adhering and including all liens and the debtor's exemption in the first totaling, the district court arrived at a figure of $378,763.44 ($180,000.00 +112,418.35 + 80,345.09 + 6,000.00 = $378,763.44). Because that sum exceeded the $280,000.00 value of the debtor's property, the district judge also concluded that the value of Brinley's statutory exemption was impaired. Rather than specify that the exemption was impaired only to the extent that the sum *exceeded* the property value ($ 378.763.44 -280,000.00 = $ 98,763.44), and offset the judicial lien only by that amount, however, the court simply concluded that "[t]he judicial lien of LPP in the amount of $112,418.35 will be avoided in its entirety."

C. Brinley's Version

The debtor agrees with the district court conclusion that the judicial lien may be avoided in its entirety in the effort to give effect to the debtor's statutory exemption. In so arguing, Brinley nevertheless adds a new wrinkle to the analysis by contending that the value of his property should be calculated at only one-half of the $280,000.00 figure used by the courts, because he owns the land with his wife and, therefore, does not individually have access to the full value of the property. By using the $140,000.00 figure that Brinley believes is appropriate, he arrives at the same ultimate result as did the district court (complete avoidance of the judicial lien) because the difference between the sum of the lien amounts, together with the exemption amount, and the value of the property ($378,763.44 - 140,000.00 = $238,763.44) far exceeds the $112,418.35 value of LPP's judicial lien.

II. Value of Property Owned by Brinley

The value to be given the property owned by the debtor thus becomes a threshold issue to be resolved in this appeal. As previously noted, both the bankruptcy court and the district court assumed that Brinley's property was valued at $280,000.00 and that the debtor, as a tenant by the entirety, was charged with that entire value. Brinley insists, however, that he holds the property only as a joint tenant with a right of survivorship and, therefore, that he personally owns only one-half of that realty.

Under Kentucky law, a joint tenancy, by definition, "is an estate held by two or more people who . . . are *not* husband and wife." *Sanderson v. Saxon*, 834 S.W.2d 676, 678, 39 7 Ky. L. Summary 30 (Ky. 1992)(emphasis added). A tenancy by the entirety, on the other hand, "is an estate in land shared by husband and wife, whereby at the death of either the survivor is entitled to full fee simple ownership." *Id.* "[T]he survivor takes the entire estate at the death of the deceased co-tenant *not* by virtue of that death, but because, in law, each was viewed to own the *entire* estate from the time of its creation." *Id.* (emphasis in original). Because Brinley and his wife shared the property in question as spouses, their interests in the realty were as tenants by the entirety. Consequently, Brinley and his wife each owned the *entire* estate and the debtor was properly charged with the full $280,000.00 value of that property.

III. Determination of Extent to Which Judicial Lien Impaired Exemption

The more difficult issue in this appeal requires us to choose between faithfulness to the explicit language of a controlling statute, with the resulting upset of the state law of

lien priorities, and adherence to established lien priorities in the face of an evident Congressional intent to modify such treatment of creditors. As the learned Judge Richard Stair of the United States Bankruptcy Court for the Eastern District of Tennessee has recognized, this court has already "expressly stated that § 522(f)(2)(A) is a 'federal definition of impairment . . . and, in light of [its] explicit language, we no longer look to state law to define impairment.'" *In re Northern*, 294 B.R. 821, 830-31 (Bankr. E.D. Tenn. 2003) (quoting *Holland*, 151 F.3d at 550). Indeed:

> [T]he plain language of the statute provides for inclusion of all liens . . . . There is nothing in § 522(f)(2) that authorizes the court to pick and choose which liens to include in the impairment analysis, depending upon any state law priority scheme. To the contrary, § 522(f)(2) expressly instructs the court to include any and all liens in making any impairment analysis. Accordingly, the court is unable to deviate from this express instruction by Congress.

Id. at 831.

But even adopting the viewpoint espoused in *In re Northern* does not require us to affirm the decision of the district court in this matter. After adding together the values of all liens on the debtor's property and the value of the exemption sought in bankruptcy, and then subtracting the agreed-upon value of the Brinley's land ($378,763.44 - 280,000.00 = $98,763.44), the district court held in conclusory fashion that "[t]he judicial lien of LPP in the amount of $112,418.35 will be avoided in its entirety." The language of the relevant statute, however, authorizes avoidance of judicial liens only *to the extent that* those liens

impair an exemption. An exemption is impaired, moreover, "*to the extent that* the sum of [the liens and the exemption] exceeds the value the debtor's interest in the property" absent the liens. 11 U.S.C. § 522(f)(2)(A). Because the amount of the impairment in this case is $98,763.44, LPP's lien may be avoided only by that amount, thus allowing Brinley to take advantage of the statutory exemption afforded him. Consequently, LPP retains a lien on the debtor's property in the amount of $13,654.91 ($112,418.35 - 98,763.44 = $13,654.91). *See In re Northern*, 294 B.R. at 830.

LPP insists, however, that anything less than complete adoption of the analysis of the *bankruptcy court* decision in this matter will not only impinge upon the state law of lien priorities but will unjustly penalize senior lienholders and provide windfalls for debtors and junior lienholders. The United States Court of Appeals for the Eighth Circuit recently addressed these same arguments in a case with facts remarkably similar to those presented in this appeal. In *Kolich v. Antioch Laurel Veterinary Hospital (In re Kolich)*, 328 F.3d 406, 410 (8th Cir. 2003), our sister circuit, after applying the express language of 11 U.S.C. § 522(f)(2)(A), stated:

> [W]e find no sufficient basis for concluding that the statutory formula produces, in this situation, a result "demonstrably at odds with the intentions of the drafters." To be sure, the Bankruptcy Code usually looks to state law to define the property rights and priorities of creditors, including secured creditors. But § 522(f) is an exception to that policy. It was enacted to permit the avoidance of judicial liens that can interfere with the debtor's post-petition fresh start. This selective avoidance gives an advantage under federal law to secured creditors holding consensual

liens, typically, residential mortgage lenders. But Congress intended to treat consensual lienholders more favorably, because their contractual relationships with the bankruptcy debtor typically allow the debtor to acquire equity in the exempt property by making post-petition mortgage payments. The 1994 amendment creating the statutory formula here at issue was expressly aimed at overruling prior judicial decisions compromising that intent.

We are not entirely comfortable with the equities of literally applying the statutory formula in this situation. It may give a debtor contemplating bankruptcy the ability to wipe out judicial liens by persuading a lender to take an otherwise junior consensual lien that renders the exempt property over-encumbered and therefore ripe for impairment. One would expect lenders to refuse to make such high-risk loans, but there may be times when self-interest or hard-to-detect collusion will lead to an abuse of § 522(f). On the other hand, refusing to apply the statutory formula as written may result in denying deserving debtors the fresh-start advantage § 522(f) was enacted to provide - for example, if a drop in market value has left exempt property over-encumbered by a judicial lien and a junior consensual lien, and the judicial lienholder insists upon foreclosure. With the competing equities both hard to weigh and finely balanced, our task is simply to apply § 522(f)(2)(A) as Congress wrote it.

(Citations omitted.)

In a final challenge to the application of the express language of 11 U.S.C. § 522(f) to the situation presented in

this litigation, LPP quotes from the reversed bankruptcy court decision and argues that the "position espoused by the Debtor ignores the U.S. Constitution, specifically, the Fifth Amendment takings clause by eliminating existing property rights." The Takings Clause of the Fifth Amendment provides simply, "[N]or shall private property be taken for public use, without just compensation." The Supreme Court has, however, "been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons." *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978). Instead, engaging in ad hoc determinations, the Court has examined numerous factors of significance, including "[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations . . . ." *Id.*

In this matter, although the application of the bankruptcy statutes does indeed have a significant economic impact on the business of LPP, the creditor cannot legitimately claim that such legislation unfairly interfered with any financial expectations. Because LPP's lien was not registered until *after* the enactment of the amendments to the Bankruptcy Code that became § 522(f)(2)(A), the creditor was on notice concerning the operation of this debtor protection provision and its potential application to LPP's business activities.

CONCLUSION

For the reasons set out above, we conclude that both the bankruptcy court and the district court failed to apply the relevant provisions of the Bankruptcy Code correctly in this

dispute. Although the district court properly determined the value of the debtor's property interest and attempted to abide by the provisions of 11 U.S.C. § 522(f)(2)(A), that court erred in ruling that the judicial lien at issue should be avoided in its entirety. We conclude, instead, that LPP should retain a judgment lien on the debtor's property in the amount of $13,654.91, the difference between the value of the original lien and the amount by which the debtor's exemption was impaired pursuant to applicable statutory provisions. We therefore AFFIRM the judgment of the district court in part, REVERSE in part, and REMAND this case for further proceedings as necessary.

CONCURRENCE

DAVID D. DOWD, JR., District Judge, concurring. I agree with the well written opinion of Judge Daughtrey because I am of the view that her analysis is consistent with the precedent that has developed since Congress adopted 11 U.S.C. § 522(f)(1). However, the notion that a subsequent mortgage lien, under the bankruptcy law, preempts an earlier filed judgment lien turns the whole concept of creditors' rights on its head. The potential for fraud is obvious.

As long as the statute remains in effect, the judgment creditor must promptly initiate foreclosure proceedings to avoid the real probability that a subsequently filed mortgage lien will trump the judgment lien. That Congress intended this result, in the context of a "fresh start," I find difficult to comprehend, but I cannot deny that it is within Congress's express Article I, Sec. 8 authority to regulate interstate commerce and "to establish . . . uniform Laws on the subject of Bankruptcies[.]" As it has already been decided that the statute does not constitute a taking in violation of the Fifth Amendment, I reluctantly concur.

I am authorized to say that Judge Batchelder joins me in this opinion.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 03-5606

[Filed March 30, 2005]

LPP MORTGAGE, LTD., Appellant	)
v.	)
FREDERICK L. RADCLIFFE, JR., Appellee	)

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
02-00376
Charles R. Simpson, III, U.S. District Judge

JUDGES: Before: GUY and SUTTON, Circuit Judges; CARR, District Judge.*

* The Honorable James G. Carr, United States District Judge for the Northern District of Ohio, sitting by designation.

OPINION

PER CURIAM. Frederick Radcliffe sought bankruptcy protection under Chapter 7 and among other things claimed a property exemption in the amount of $6,000. Invoking 11 U.S.C. § 522(f), he argued that the exemption allows him to avoid all of a judgment lien that LPP Mortgage, Ltd., holds against his house. The district court agreed, and so now do we.

Radcliffe owns a $250,000 house in Louisville, Kentucky. Over time, the following statutory and recorded liens (in order of priority) were placed on his property: (1) an ad-valorem real-estate statutory tax lien in the amount of $15,000; (2) a first mortgage on the property for $180,000; (3) a judgment lien (by LPP) in the amount of $112,418.35; and (4) a state statutory tax lien in the amount of $56,548.03.

In the course of his bankruptcy proceeding, Radcliffe claimed a property exemption of $6,000, which he sought to protect by moving the bankruptcy court to avoid the judgment lien of LPP to the extent that it impairs his exemption under 11 U.S.C. § 522(f). Section 522(f)(2)(A) establishes the following formula for determining when a lien impairs an exemption:

> (2)(A) For the purposes of this subsection, a lien shall be considered to impair an exemption to the extent that the sum of —
>
> (i) the lien;
>
> (ii) all other liens on the property; and
>
> (iii)the amount of the exemption that the

> debtor could claim if there were no liens on the property;
>
> exceeds the value that the debtor's interest in the property would have in the absence of any liens.

The bankruptcy court held that Radcliffe could avoid $48,418 of LPP's lien under the statute. In applying the formula, the bankruptcy court reasoned that it must consider state priority law in calculating the extent to which a lien impairs an exemption. As a result, it did not add all of the liens on the property to the calculation but only the liens senior to LPP's lien. The bankruptcy court also held that the calculation does not apply to statutory liens and thus excluded the $15,000 ad-valorem real-estate tax lien, even though it is senior to LPP's lien.

On appeal, the district court reversed. It held that the language of the statute does not accommodate state priority law. By its terms, the court noted, § 522(f)(2)(A) requires the exemption-impairment calculation to consider "all other liens," which includes liens that are senior to and junior to the lien at issue. The court also concluded that the statute did not draw a distinction between statutory and recorded liens and thus included the ad-valorem real-estate tax lien in the calculation. All of these calculations considered, the court concluded that Radcliffe could avoid LPP's lien in its entirety.

On appeal, LPP challenges two aspects of the district court's decision. It first argues that the calculation under § 522(f)(2)(A) must account for state priority law. It then argues that the calculation does not apply to statutory liens, such as the lien arising by operation of law from the failure to pay ad-valorem real-estate taxes.

Neither issue requires extensive discussion. Another panel of this court recently addressed the first issue in a published decision, and the parties agree that we are bound by that ruling. In *Brinley v. LPP Mortgage, Ltd.*, Nos. 03-5607/5653, 2005 U.S. App. LEXIS 4606 (6th Cir. Mar. 22, 2005), the court held that the straightforward language of § 522(f)(2)(A) does not permit courts to account for state priority law in making the exemption-impairment calculation. Adhering to that precedent, we reject LPP's argument that the state tax lien, though junior to LPP's lien, may not be considered in the calculation.

Turning to the second issue, we agree with the district court that the ad-valorem-tax lien was properly included in the calculation. Section 522(f)(2)(A) does not draw a distinction between statutory and recorded liens but instead refers expansively to "all other liens on the property." Making matters worse for LPP's argument, the Bankruptcy Code defines "lien" as a "charge against or interest in property to secure payment of a debt or performance of an obligation," 11 U.S.C. § 101(37), a definition that applies equally to statutory and recorded liens. Because there is no dispute that a statutory lien arose in this instance by operation of law when Radcliffe failed to pay his real estate taxes, see Ky. Rev. Stat. § 134.420, and because this tax debt may be collected against him personally, the language of § 522(f)(2)(A) requires this lien to be included in the impairment-exemption calculation.

For these reasons, we affirm the judgment of the district court.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

CIVIL ACTION NO. 3:02CV-378-S

[Filed April 1, 2003]

STUART C. BRINLEY, APPELLANT	)
v.	)
LPP MORTGAGE, LTD., APPELLEE	)

CHARLES R. SIMPSON III, JUDGE
UNITED STATES DISTRICT COURT

MEMORANDUM OPINION

This matter is on appeal from the bankruptcy court. At issue is the proper methodology for calculating the extent to which a judicial lien may be avoided because it impairs an exemption in the property to which the debtor is entitled under the Bankruptcy Code.

The facts are straightforward and undisputed. The debtor, jointly with his non-debtor spouse with right of survivorship, owns a house and lot in Louisville, Kentucky with a fair market value of $280,000.00. The debtor claims and wishes to have the benefit of a $6,000.00 exemption in this property.

The property is encumbered by several liens. They are, in order of priority, as follows:

1. $180,000.00 - first mortgage;

2. $112.418.35 - judgment lien in favor of LPP Mortgage, Ltd., the appellee (hereinafter LPP);

3. $80,345.09 - second mortgage.

Title 11, United States Code, Section 522(f)(1) provides, in essence, that a debtor such as appellant may avoid a lien to the extent that the lien impairs the debtor's exemption.

A lien impairs an exemption to the extent that the sum of the judicial lien, all other liens on the property, and the amount of the exemption exceeds the fair value of the debtor's interest in the property in the absence of any liens. 11 U.S.C. § 522(f)(2).

The liens against the property total $372,763.44. Since the agreed value of the property is $280,000.00, it is obvious that the debtor/appellant's $6,000.00 exemption is impaired by LPP's lien.

In this action, the debtor/appellant wishes to avoid LPP's lien completely. He reasons that LPP's lien impairs his exemption because, as provided in 11 U.S.C. § 522(f)(2)(A), the sum of LPP's lien plus all other liens on the property, and

the amount of the exemption, exceeds the value of his interest in the property in the absence of any liens.

In its order below, the bankruptcy court calculated the extent to which LPP's lien impaired the $6,000.00 exemption. The bankruptcy court began subtracting the liens from the agreed value of the property, in the order of priority, to determine the extent to which LPP's lien impaired the debtor/appellant's exemption. In essence, after subtracting the debtor's exemption of $6,000.00 and the first mortgage in the amount of $180,000.00, the bankruptcy court found that there was $94,000.00 in equity available to secure LPP's lien, and that the unsecured balance of $18,418.35 impaired the exemption and was therefore avoidable.

On appeal, the debtor/appellant takes issue with two aspects of the bankruptcy court's calculus:

> 1. Should the bankruptcy court have considered the liens in order of priority in order to determine the extent to which the lien in question impairs the debtor/appellant's exemption?
>
> 2. Should the bankruptcy court have determined the value of the debtor's interest in the property as being $140,000.00, or one-half of the total value, because the debtor owned the property in joint tenancy with his non-debtor spouse with right of survivorship?

We will address these issues in turn.

A. CONSIDERING LIENS IN ORDER OF PRIORITY

The crux question in this part of the appeal is whether the bankruptcy court properly disregarded the inferior second

mortgage of $80,345.09 in determining that just a portion of the LPP mortgage could be avoided by the debtor. The bankruptcy court observed "We do not believe, however, that Congress intended to alter state law lien priorities when it added [11 U.S.C. § 522(f)(2)(A)]." While the bankruptcy court found support for its position in several cases cited in the opinion below, it is clear that the bankruptcy court disregarded the precise language of the cited statute.

We have found no authority in the Sixth Circuit on this point.

The situation presented in *In re Kolich,* 273 B.R. 199 (8th Cir. BAP 2002), is remarkably similar to the facts presented here. We find the rationale in this case persuasive, especially since it encompasses the calculus provided by Congress in § 522(f)(2)(A). State lien priority law, while perhaps useful in state foreclosure proceedings, simply has no applicability when Congress has spoken on the subject, and clearly. Accordingly, the judgment of the bankruptcy court will be reversed in this regard.

B. VALUING THE INTEREST OF THE DEBTOR AS ONE-HALF OF THE AGREED VALUE OF THE PROPERTY

The bankruptcy court declined to reduce the debtor's interest in the property to $140,000.00, on the basis that Kentucky law provides that owners of a tenancy by the entirety own the entire fee which neither spouse can sever individually, citing *Hayes v. Schaefer,* 399 F.2d 300, 301-02 (6th Cir. 1968), and *United States of America v. Real Property Located at 5205 Mount Howard Court, Louisville, Kentucky, et al,* 755 F. Supp. 169, 173 (W.D. Ky. 1990).

The debtor/appellant contends that even though he and his spouse are still alive and married, the court should view the debtor's interest as being $140,000.00, or one-half of the agreed value. It is obvious that the debtor/appellant's interest in the property will either be zero or $280,000.00, depending on whether he or his spouse dies first. The bankruptcy court was absolutely correct in its ruling, and we will therefore affirm in this regard.

C. CONCLUSION

In accordance with this opinion, the bankruptcy court's determination with respect to the partial avoidability of the LPP lien will be reversed. The judicial lien of LPP in the amount of $112,418.35 will be avoided in its entirety. The bankruptcy court's determination with respect to the value of the debtor's interest in the property will be affirmed.

A separate order will be entered in conformity with this opinion.

This 1st day of April, 2003.

/s/_____
CHARLES R. SIMPSON III, JUDGE
UNITED STATES DISTRICT COURT

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

CIVIL ACTION NO. 3:02CV-376-S

[Filed April 1, 2003]

FREDERICK L. RADCLIFFE, JR., APPELLANT	)
v.	)
LPP MORTGAGE, LTD., APPELLEE	)

CHARLES R. SIMPSON III, JUDGE
UNITED STATES DISTRICT COURT

MEMORANDUM OPINION

This matter is on appeal from the bankruptcy court. At issue is the proper methodology for calculating the extent to which a judicial lien may be avoided because it impairs an exemption in the property to which the debtor is entitled under the Bankruptcy Code.

The facts are straightforward and undisputed. The debtor owns a house and lot in Louisville, Kentucky with a fair market value of $250,000.00. The debtor claims and wishes to have the benefit of a $6,000.00 exemption in this property.

The property is encumbered by several liens. They are, in order of priority, as follows:

1. $15,000.00 - ad valorem real estate taxes;

2. $180,000.00 - first mortgage;

3. $112,418.35 - judgment lien in favor of LPP Mortgage, Ltd., the appellee (hereinafter LPP);

4. $56,548.03 - state tax lien.

Title 11, United States Code, Section 522(f)(1) provides, in essence, that a debtor such as appellant may avoid a lien to the extent that the lien impairs the debtor's $6,000.00 exemption.

A lien impairs an exemption to the extent that the sum of the lien, all other liens on the property, and the amount of the exemption exceeds the value of the debtor's interest in the property in the absence of any liens. 11 U.S.C. § 522(f)(2).

The liens against the property total $363,967.18. Since the agreed value of the property is $250,000.00, it is obvious that the debtor/appellant's $6,000.00 exemption is impaired by LPP's lien.

In this action, the debtor/appellant wishes to avoid the third lien out of four, that being the lien of LPP in the amount of $112,418.35. He reasons that LPP's lien impairs his

exemption because, as provided in 11 U.S.C. § 522(f)(2)(A), the sum of LPP's lien plus all other liens on the property and the amount of his exemption exceeds the value of his interest in the property in the absence of any liens. Of course, if LPP's lien were avoided in its entirety, there would still not be any equity in the property to satisfy the debtor/appellant's exemption, since the total of all other liens is $251,548.83, which is in excess of the property's $250,000.00 agreed value.

In its order below, the bankruptcy court calculated the extent to which LPP's lien impaired the $6,000.00 exemption. First, the bankruptcy court disregarded the $15,000.00 ad valorem tax lien on the basis that § 522(f)(2)(A) did not mention ad valorem tax assessments, and that the lien was statutory, not recorded.

The bankruptcy court then began subtracting the liens from the agreed value of the property, in order of priority, to determine the extent to which LPP's lien impaired the debtor/appellant's exemption. In essence, after subtracting the debtor's exemption of $6,000.00 and the first mortgage in the amount of $180,000.00, the bankruptcy court found that there was $64,000.00 in equity available to secure LPP's lien, and that the unsecured balance of $48,418.35 impaired the exemption and was therefore avoidable.

On appeal, the debtor/appellant takes issue with two aspects of the bankruptcy court's calculus:

5. Should the bankruptcy court have disregarded the $15,000.00 ad valorem tax lien?

6. Should the bankruptcy court have considered the liens in order of priority in order to determine the

extent to which the lien in question impairs the debtor/appellant's exemption?

We will address these issues in turn.

A. THE $ 15,000.00 AD VALOREM TAX LIEN

On appeal, LPP contends that ad valorem tax assessments are not debts of a debtor, but debts of the land. It contends that since the land has liability for payment of ad valorem taxes, the lien imposed by Kentucky law does not comport with the definition of lien contained in 11 U.S.C. § 101(37).

The debtor/appellant contends that the Bankruptcy Code makes no distinction between statutory and recorded liens, which was the point of distinction in the bankruptcy court's opinion. Debtor/appellant's contention is clearly correct.

An examination of the Kentucky statutes reveals that the position taken by LPP is clearly incorrect. KRS 134.060 makes the owner of real property, here the debtor/appellant, liable for taxes thereon. The tax is the personal debt of the person liable for payment. KRS 134.050. The lien imposed by KRS 134.420 obviously secures the payment of taxes, as does KRS 91A.070.

We conclude that the ad valorem state tax lien, while not avoidable because it is not a judicial lien as defined in 11 U.S.C. § 101(36), is nevertheless a lien which must be taken into account in determining the extent to which an avoidable lien impairs the debtor's exemption.

The bankruptcy court will be reversed in this regard.

B. CONSIDERING LIENS IN ORDER OF PRIORITY

Aside from the bankruptcy court's failure to properly consider the $15,000.00 ad valorem tax lien, the crux question in this part of the appeal is whether the bankruptcy court properly disregarded the inferior state tax lien of $56,548.03 in determining that just a portion of the LPP mortgage could be avoided by the debtor. The bankruptcy court observed "We do not believe, however, that Congress intended to alter state law lien priorities when it added [11 U.S.C. § 522(f)(2)(A)]." While the bankruptcy court found support for its position in several cases cited in the opinion below, it is also clear that the bankruptcy court disregarded the precise language of the cited statute.

We have found no authority in the Sixth Circuit on this point.

The situation presented in *In re Kolich,* 273 B.R. 199 (8th Cir. BAP 2002), is remarkably similar to the facts presented here. We find the rationale in this case persuasive, especially since it encompasses the calculus provided by Congress in § 522(f)(2)(A). State lien priority law, while perhaps useful in state foreclosure proceedings, simply has no applicability when Congress has spoken on the subject, and clearly. Accordingly, the judgment of the bankruptcy court will be reversed in this regard as well.

C. CONCLUSION

In accordance with this opinion, the bankruptcy court's determination to disregard the $15,000.00 ad valorem state tax lien in its lien avoidance calculation will be reversed. The bankruptcy court's determination with respect to the partial avoidability of the LPP lien will be reversed. The judicial lien

of LPP in the amount of $112,418.35 will be avoided in its entirety.

A separate order will be entered in conformity with this opinion.

This 1st day of April, 2003.

/s/_____
CHARLES R. SIMPSON III, JUDGE
UNITED STATES DISTRICT COURT

APPENDIX E

UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF KENTUCKY

Case No. 01-30824(3)7

[Filed May 24, 2002]

IN RE: STUART C. BRINLEY,
Debtor.

DAVID T. STOSBERG
United States Bankruptcy Judge

MEMORANDUM

This matter is before the Court on the motion of the Debtor to avoid the judgment lien of LPP Mortgage, Ltd. ("LPP") on a house and lot located at 1007 Johnson Farm Road, Louisville, Kentucky (the "Property"). The Court heard arguments of counsel and the parties stipulated the Property value, lien amounts, and priority of liens. For the reasons that follow, LPP's judgment lien is partially avoided.

Factual Background

In order of priority, there is a first mortgage lien in the amount of $180,000, LPP's judgment lien in the amount of

$112,418.35, and a junior mortgage in favor of Bank One of $80,345.09. The Debtor claims an exemption of $6,000 and seeks avoidance of LPP's lien on the Property which is worth $280,000. The Debtor owns the Property with his non-debtor spouse jointly with rights of survivorship, and the judgment from which LPP's lien arose is only against Mr. Brinley and not his non-debtor spouse.

Legal Analysis

This case presents the question of whether to consider the priority of liens in applying the formula under section 522(f) for avoidance of liens. The Debtor argues that using the simple mathematical formula of section 522(f)(2)(A), the exemption is impaired to the extent that the total of all liens on the property exceed the value of the property in the absence of liens. According to the Debtor's application of the § 522(f) formula, the value of the Property ($280,000), less the first mortgage ($180,000), less the Bank One mortgage ($80,345.09), equals $19,654.91. The Debtor then proposes to split the equity in half, applying $9,827.45 to the Debtor, deducting the Debtor's $6,000 exemption, leaving $3,827.45 in equity for LPP's lien to attach and avoiding the remainder of LPP's judgment lien. (See Exhibit A to docket # 44 for Debtor's calculation).

LPP argues that the second consensual mortgage should not be considered in the mathematical impairment formula as LPP's lien has priority over the second mortgage. According to LPP, the value ($280,000), less the first mortgage ($180,000), less the $6,000 exemption, leaves $94,000 of value remaining for LPP's judicial lien. LPP's analysis results in the avoidance of $18,418.35 of its judgment lien as the portion which impairs the Debtor's exemption.

In 1994, Congress amended the lien avoidance section by adding a definition of impairment of an exemption, found in 11 U.S.C. § 522(f)(2)(A), providing:

> For the purposes of this subsection, a lien shall be considered to impair an exemption to the extent that the sum of –
>
> (i) the lien;
>
> (ii) all other liens on the property; and
>
> (iii) the amount of the exemption that the debtor could claim if there were no liens on the property;
>
> exceeds the value that the debtor's interest in the property would have in the absence of any liens.

By devising this formula, Congress intended to clarify the application of the statute, overrule certain cases, and provide a simple arithmetic test to determine whether a lien impairs an exemption. *In re Holland,* 151 F.3d 547, 549 (6th Cir. 1998) (citing, H.Rep. No. 103-835, at 52-53 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3340, 3361-62). We do not believe, however, that Congress intended to alter state law lien priorities when it added the above section. The position espoused by the Debtor ignores the U.S. Constitution, specifically, the Fifth Amendment takings clause by eliminating existing property rights. *See In re Dolan,* 230 B.R. 642, 647 (Bankr. D. Conn. 1999) (citing, *U.S. v. Security Industrial Bank,* 459 U.S. 70, 78, 103 S. Ct. 407, 74 L. Ed. 2d 235 (1982), where the Supreme Court stated, "It is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the constitutional question may be avoided.").

We therefore join the courts that construe the language of the statute to prevent the unjust result produced by merely totaling all liens and the exemption, without regard to state law priorities. *See In re Lehman*, 205 F.3d 1255 (11th Cir. 2000); *Nelson v. Scala*, 192 F.3d 32 (1st Cir. 1999); *In re Ware*, 274 B.R. 206 (Bankr. D. S. C. 2001); and *In re Dolan*, 230 B.R. 642 (Bankr. D. Conn. 1999). As the court in *Dolan* explained,

> While the calculation prescribed in § 522(f)(2)(A) makes no explicit reference to the priority position of any of the liens included in the calculation, the iterative nature of the formula, as defined under § 522(f)(2)(B) for property subject to more than one lien, implicitly requires a determination of the relative priorities of at least the judicial liens. Since the formula is to be applied repeatedly, eliminating each lien previously avoided from the subsequent calculations, the order in which they are eliminated is material. Those rulings purporting to apply the formula literally implicitly recognize the priority order of liens established under state law -- applying the formula consecutively, starting with the most junior of the judicial liens and avoiding one judicial lien (or part thereof) at a time, until the formula indicates no further impairment. (Internal citations omitted).
>
> Since state law priority determines the order in which judicial liens be avoided, the court concludes, under the circumstances of this case, that the formula be applied to *exclude* junior nonavoidable liens in the computation of whether Cadle's judgment lien impairs Raymond's exemption, thereby avoiding the constitutional issue.

In re Dolan, 230 B.R. at 647. This position is supported by the Congressional Record in support of the 1994 Amendments to section 522(f), where the dissent in *In re Simonson,* 758 F.2d 103, 106-113 (3rd Cir. 1985) is adopted. The Amendment specifically overruled the majority opinion in *Simonson*, in which the Third Circuit held that a judicial lien could not be avoided where the judicial lien held a senior priority position to a nonavoidable mortgage.

We also address the issue of whether the value or equity in the Property should be divided in half based on the ownership of the Property by the Debtor in joint survivorship form with his non-debtor spouse. The Debtor claimed a homestead exemption pursuant to KRS 427.060 of $5,000 and a general exemption in the Property of $1,000 under KRS 427.160. The Debtor states that he has not claimed an exemption in the Property pursuant to § 522(b)(2)(B) as an interest in property held as a tenant by the entirety. Nonetheless, on the date of filing, the Debtor held the Property as a joint tenant with the right of survivorship. Just as we decline to disturb the priority of the liens, we also decline to mischaracterize the nature of the Debtor's interest in the Property by dividing the value of the Property. Owners of tenancy by the entirety property own the entire fee which neither spouse can sever individually. *See Hayes v. Schaefer,* 399 F.2d 300, 301-02 (6th Cir. 1968). *See also, United States of America v. Real Property Located at 5205 Mount Howard Court Louisville, Kentucky, et al.,* 755 F.Supp. 169, 173 (W.D. Ky. 1990). Dividing the equity between the Debtor and his non-debtor spouse would alter the nature of the Debtor's entireties interest in the Property, afford the Debtor a windfall, and produce an inequitable result. Our holding adopts a holistic approach which affords the Debtor his exemption in the Property without upsetting the priority of

the liens or altering the nature of the Debtor's interest in the Property.

Conclusion

The Court concludes that the priority of liens is material to considering a lien avoidance motion under 11 U.S.C. § 522(f), and therefore, we must exclude from the impairment calculation the Bank One mortgage which is junior in priority to the lien of LPP. We apply the formula as follows:

Lowest Priority Judicial Lien Remaining (LPP's lien):		$112,418
+ Sum of All Other Encumbrances Senior to LPP's Lien:		$180,000(1st mtg)
+ Debtor's Exemption:		$ 6,000
	=	$298,418
-- Value of the Property:		$280,000
Amount Impairing Exemption:	=	$18,418

Based on the formula above, LPP's lien is avoided in the amount of 18,418, leaving LPP with a judgment lien of $94,000 on the Property.

We have entered an Order this same date consistent with the findings and conclusions of this Memorandum.

May 24, 2002

/s/_____
DAVID T. STOSBERG
United States Bankruptcy Judge

ORDER

Pursuant to the court's Memorandum entered this same date and incorporated herein by reference,

IT IS ORDERED that the Motion of the Debtors to avoid the judgment lien of LPP Mortgage, Ltd. be, and is hereby, **sustained** in part and **overruled** in part. Specifically, LPP's lien on a house and lot located at 1007 Johnson Farm Road, Louisville, Kentucky, is avoided to the extent of $18,418, leaving LPP with a lien on the property for the balance of $94,000.

May 24, 2002

/s/_____
DAVID T. STOSBERG
United States Bankruptcy Judge

APPENDIX F

UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF KENTUCKY

Case No. 01-30822(3)7

[Filed May 24, 2002]

IN RE: FREDERICK L. RADCLIFFE, JR.,)
Debtor.)

DAVID T. STOSBERG
United States Bankruptcy Judge

MEMORANDUM

This matter is before the Court on the motion of the Debtor to avoid the judgment lien of LPP Mortgage, Ltd. ("LLP") on a house and lot located at 2600 Six Mile Lane (the "Property"). The Court heard arguments of counsel and the parties agree upon the value, lien amounts, and priority of liens. For the reasons that follow, LPP's judgment lien is partially avoided.

Factual Background

The parties stipulated to a fair market value of $250,000 for the Property. In order of priority, there is a lien for ad

valorem real estate taxes of $15,000, a first mortgage on the Property in the amount of $180,000, LPP's judgment lien in the amount of $112,418.35, and a state tax lien of $56,548.03. The Debtor claimed an exemption of $6,000 and seeks avoidance of LPP's lien.

Legal Analysis

The precise question for the Court is whether the priority of liens is considered in applying the formula under section 522(f) for avoidance of liens. The Debtor argues that using the simple mathematical formula of section 522(f)(2)(A), the exemption is impaired to the extent that the total of all liens on the property exceed the value of the property in the absence of liens. According to the Debtor, all liens on the property plus the exemption total $369,967.18, which exceeds the stipulated $250,000 value of the Property, and therefore, LPP's judgment lien should be avoided in its entirety. (See Exhibit A to docket # 41 for Debtor's calculation).

LPP, on the other hand, argues that the Court should ignore the state tax lien of $56,548.03 in applying the formula to this case, as LPP's lien has priority over the state tax lien. Using LPP's approach, the Property's value of $250.000, minus the first mortgage of $180,000, less the Debtor's $6,000 exemption, leaves $64,000 in equity remaining, and LPP asserts entitlement to a lien in that amount ($64,000). LPP's analysis results in the avoidance of $48,418.35 of its judgment lien as the portion which impairs the Debtor's exemption.

Section 522(f)(2)(A) provides that the calculation for determining impairment of the exemption includes the lien in question, all other liens and the debtor's exemption. There is no mention in the statute of including ad valorem tax

assessments, and any lien attaching to the Property from non-payment of these taxes constitutes a statutory lien, not a recorded lien. Statutory liens are not included in the Code's formula for calculating impairment, and therefore, the Court will not factor in the ad valorem real estate taxes on the Property of $15,000.

In 1994, Congress amended the lien avoidance section by adding a definition of impairment of an exemption, found in 11 U.S.C. § 522(f)(2)(A), providing:

> For the purposes of this subsection, a lien shall be considered to impair an exemption to the extent that the sum of -
>
> (i) the lien;
>
> (ii) all other liens on the property; and
>
> (iii) the amount of the exemption that the debtor could claim if there were no liens on the property;
>
> exceeds the value that the debtor's interest in the property would have in the absence of any liens.

By devising this formula, Congress intended to clarify the application of the statute, overrule certain cases, and provide a simple arithmetic test to determine whether a lien impairs an exemption. *In re Holland*, 151 F.3d 547, 549 (6th Cir. 1998) (citing, H. Rep. No. 103-835, at 52-53 (1994), *reprinted* in 1994 U.S.C.C.A.N. 3340, 3361-62). We do not believe, however, that Congress intended to alter state law lien priorities when it added the above section. The position espoused by the Debtor ignores the U.S. Constitution, specifically, the Fifth Amendment takings clause by eliminating existing property rights. *See In re Dolan*, 230 B.R. 642, 647 (Bankr. D. Conn. 1999) (citing, U.S. v. *Security Industrial Bank,* 459 U.S. 70, 78, 103 S. Ct. 407, 74 L. Ed. 2d 235 (1982), where the Supreme Court stated, "It is

a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the constitutional question may be avoided.").

We therefore join the courts that construe the language of the statute to prevent the unjust result produced by merely totaling all liens and the exemption; otherwise, LPP's lien would be avoided in its entirety, which would produce a windfall to the Debtor. *See In re Lehman*, 205 F.3d 1255 (11th Cir. 2000); *Nelson v. Scala,* 192 F.3d 32 (1st Cir. 1999); *In re Ware*, 274 B.R. 206 (Bankr. D. S. C. 2001); and *In re Dolan*, 230 B.R. 642 (Bankr. D. Conn. 1999). As the court in *Dolan* explained,

> While the calculation prescribed in § 522(f)(2)(A) makes no explicit reference to the priority position of any of the liens included in the calculation, the iterative nature of the formula, as defined under § 522(f)(2)(B) for property subject to more than one lien, implicitly requires a determination of the relative priorities of at least the judicial liens. Since the formula is to be applied repeatedly, eliminating each lien previously avoided from the subsequent calculations, the order in which they are eliminated is material. Those rulings purporting to apply the formula literally implicitly recognize the priority order of liens established under state law - applying the formula consecutively, starting with the most junior of the judicial lens and avoiding one judicial lien (or part thereof) at a time, until the formula indicates no further impairment. (Internal citations omitted).
>
> Since state law priority determines the order in which judicial liens be avoided, the court concludes, under the circumstances of this case, that the formula be

applied to *exclude* junior nonavoidable liens in the computation of whether Cadle's judgment lien impairs Raymond's exemption, thereby avoiding the constitutional issue.

In re Dolan, 230 B.R. at 647.

Conclusion

The Court concludes that the priority of liens is material to considering a lien avoidance motion under 11 U.S.C. § 522(f). In this case, we must exclude from the calculation the state tax lien which is junior in priority to the lien of LPP and any previous avoided liens on the Property. Thus, we apply the formula as follows:

Lowest Priority Judicial Lien Remaining (LLP's lien):		$112,418
+ Sum of All Other Encumbrances Senior To Lien Above:		$180,000
+ Debtors Exemption:		$ 6,000
	=	$298,418
- Value of Property:		$250,000
= Amount Impairing Exemption:	=	$ 48,418

Based on the formula above, LLP's lien is avoided in the amount of $48,418 and LPP retains a lien on the property in the amount of $64,000.

We have entered an order this same date consistent with the findings and conclusions of this Memorandum.

May 24, 2002

/s/ _____
DAVID T. STOSBERG
United States Bankruptcy Judge

ORDER

Pursuant to the Court's Memorandum entered this same date and incorporated herein by reference,

IT IS ORDERED that the Motion of the Debtors to avoid the judgment lien of LPP Mortgage, Ltd. be, and is hereby, **sustained** in part and **overruled** in part. Specifically, $48,418 of LPP's lien on the Debtor's house and lot located at 2600 Six Mile Lane is avoided, leaving LPP with a lien on the property for the balance of $64,000.

May 24, 2002

/s/_____
DAVID T. STOSBERG
United States Bankruptcy Judge

APPENDIX G

UNITED STATED BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF KENTUCKY

Case No. 01-30824

[Filed: January 8, 2002]

IN RE: Stuart C. Brinley, DEBTOR.	)

AGREED STIPULATIONS OF FACT BETWEEN LPP MORTGAGE, LTD. AND STUART C. BRINLEY, DEBTOR

Creditor, LPP Mortgage, LTD. ("LPP") and Debtor, Stuart C. Brinley ("Debtor"), hereby stipulate to the following facts:

1. Stuart Brinley and Pamela Brinley own the property located at 1007 Johnson Farm Road, Louisville, Kentucky 40245 ("the property") in fee simple jointly with the remainder to the survivor of them by virtue of a deed dated February 28, 1995.

2. On February 28, 1995, Stuart Brinley and Pamela Brinley executed a mortgage to PHH US Mortgage Corporation in the amount of $192,000.00. The

amount now due and owing on the mortgage is $180,000.00.

3. On June 6, 1995, a Judgment Lien against Debtor in favor of PNC Bank, Kentucky, Inc., f/k/a Citizens Fidelity Bank & Trust Company was filed for record pursuant to the execution of an Agreed Judgment. The lien was assigned to LPP Mortgage, LTD. The amount now due and owing on the lien is $112,418.35, plus interest from May 22, 2001 at the rate of two percentage points above prime.

4. On March 31, 1999, Stuart C. Brinley and Pamela Brinley executed a mortgage to Bank One, Kentucky, N.A. in the amount of $100,000.00. The amount now due and owing on the mortgage is $80,345.09. This mortgage is secured not only by this property, but also by property located at 2600 Six Mile Lane, Louisville, KY 40220 and by property located at 1225 Larue Avenue, Louisville, KY 40213. For purposes of this Motion to Avoid Judgment Lien, the parties stipulate that only the property located at 1007 Johnson Farm Road, Louisville, Kentucky 40245 and owned by Stuart Brinley and Pamela Brinley shall stand as security for this mortgage.

5. The value of the property is $280,000.00.

Respectfully Submitted,

/s/_____

Hon. Richard A. Schwartz
Attorney for Debtor
(502) 485-9200

/s/_____

Hon. Kathleen E. Hayes
Attorney for LPP Mortgage Ltd.
(513) 412-6600 ext. 111

APPENDIX H

UNITED STATED BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF KENTUCKY

Case No. 01-30822(3)7

[Filed: January 8, 2002]

IN RE: Frederick L. Radcliffe, Jr., DEBTOR.	)

AGREED STIPULATIONS OF FACT BETWEEN LPP MORTGAGE, LTD. AND FREDERICK L. RADCLIFFE, JR., DEBTOR

Creditor, LPP Mortgage, LTD. ("LPP") and Debtor Frederick L. Radcliffe, Jr. ("Debtor"), hereby stipulate to the following facts:

1. Frederick L. Radcliffe, Jr. Owns the property located at 2600 Six Mile Lane, Louisville, Kentucky 40220 ("the property") in fee simple by virtue of a deed dated January 29, 1992.

2. Ad valorem taxes in the amount of approximately $15,000 are now due and owing on the property.

3. On June 6, 1995, a Judgment Lien against Debtor, in favor of PNC Bank, Kentucky, Inc., f/k/a Citizens Fidelity Bank & Trust Company was filed for record pursuant to the execution of an Agreed Judgment. The lien was assigned to LPP Mortgage, LTD. The amount now due and owing on the lien is $112,418.35, plus interest from May 22, 2001 at the rate of two percentage points above prime.

4. On August 13, 1996, Debtor executed a mortgage to Bank of Louisville and Trust Company in the amount of $170,000.00. The amount now due and owing is $180,000.00. LPP's lien has been subordinated to this mortgage.

5. On March 31, 1999, Frederick L. Radcliffe, Jr., executed a mortgage to Bank One, Kentucky, N.A. in the amount of $100,000. The amount now due and owing on the mortgage is $80,345.09. This mortgage is secured not only by this property, but also by property located at 1225 Larue Avenue, Louisville, KY 40213 and by property located at 1007 Johnson Farm Road, Louisville, KY 40245. For purposes of this Motion to Avoid Judgment Lien, the parties stipulate that only the property located at 1007 Johnson Farm Road, Louisville, KY 40245 and owned by Stuart Brinley and Pamela Brinley shall stand as security for this mortgage.

6. On June 10, 1997, a Judgment Lien against Debtor, in favor of City of Jeffersontown, Kentucky, was filed for record. The amount now due and owing is approximately $311.

7. One October 9, 1997, a Notice of State Tax Lien against Debtor and in favor of the Commonwealth of Kentucky was filed for record. The amount due and owing on the lien with interest calculated to January 10, 2002 is $56,548.83.

8. On December 12, 1997, a Judgment Lien against Debtor, in favor of Bank One, Kentucky, N.A. was filed for record. The amount of the lien was $9,363.86, plus attorney's fees and interest.

9. On May 21, 1999, a Judgment Lien against Debtor, in favor of City of Jeffersontown, Kentucky, was filed for record. The amount due and owing is approximately $36.68.

9. On May 21, 1999, a Judgment Lien against Debtor, in favor of City of Jeffersontown, Kentucky, was filed for record. The amount due and owing is approximately $328.79.

10. On September 25, 2000, a Judgment Lien against Debtor, in favor of City of Jeffersontown, Kentucky, was filed for record. The amount due and owing is approximately $331.00.

11. The property has a value of $250,000.00.

Respectfully Submitted,

/s/_____

Hon. Richard A. Schwartz
Attorney for Debtor
(502) 485-9200

/s/_____

Hon. Kathleen E. Hayes
Attorney for LPP Mortgage Ltd.
(513) 412-6600 ext. 111